No. 3808

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief

In Error to the District Court for the Territory of Alaska, Division Number One, Juneau.

Reply Brief for Plaintiff in Error

DEMURRER TO INDICTMENT

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SOME INACCURATE STATEMENTS

There are some inaccurate statements in the brief for defendant in error relating to the origin and relationship of certain statutory laws of Oregon and Alaska, which must be corrected before the real merits of the argument in this case can be understood and agreed on.

On page nine of his brief the United States Attorney begins his answering argument by referring to sections 1894 and 1898 of the Compiled Laws of Alaska, 1913, defining the crime of rape

and assault with intent to commit rape, in Alaska, and declares: *"These two sections were borrowed bodily from the Oregon Code."*

While it may be admitted that some of the statutory laws of Alaska are identical with some of the Oregon laws, counsel for the United States is entirely mistaken when he declares that sections 1894 and 1898 were borrowed from Oregon by the Congress which enacted the Alaska Criminal Code of 1899.

The purpose counsel for defendant in error had in making such an inaccurate statement to the court was evidently to bind the plaintiff in error to the exact phraseology used by Judge Wolverton in the opinion in *State vs. Sargent*, 32 Or. 110, 49 Pac. 889, and to limit this court to the construction so announced in that case—as understood by counsel for defendant in error.

If this court will compare section 1894, Alaska, on page 18, of the brief of plaintiff in error in this case, with the section 1733, Hill's Ann. Laws Or., as amended (see Sess. Laws 1895, p. 67), on page 10 of the brief of defendant in error in this case, the fundamental difference of the two sections will be instantly disclosed and the inaccuracy of counsel shown.

Counsel for defendant in error is also inaccurate in the next succeeding paragraph of his brief,

in continuing the mistake about the origin of the section 1894, Alaska, when he says (italics mine): "The doctrine that *assault with intent to commit rape is an included crime, under the Oregon statutes, in an indictment for statutory rape,* is well stated and settled in the Oregon case of *State vs. Sargent* (49 Pac. 889). Judge Wolverton, *in passing upon this point and commenting upon the identical statutes under which the verdict in the case at bar was found, said:*" (Here follows quotation).

Now, aside from the facts that section 1894 of the Alaska statutes was *not* "borrowed bodily from the Oregon Code," and is *not* identical with the statute quoted in *State vs. Sargent,* and that Judge Wolverton *did not* comment "upon the identical statutes under which the verdict in the case at bar was found," but *did* correctly quote the Oregon statute upon which the case of *State vs. Sargent* was based, and *did not* announce any such doctrine that assault with intent to commit rape is an included crime under the Oregon statute, in an indictment for statutory rape, but *did* fairly disclose in his opinion that the defendant in the case of *State vs. Sargent* was actually *indicted* for and *convicted of assault with intent* to commit rape *under section* 1740 of the then Oregon Code, and *not* under the *section* 1733 thereof, relating to and de-

fining statutory rape, the above quotation from the brief of defendant in error is innocuous.

Counsel for defendant in error having become confused and inaccurate in his judgment about the facts and principles of law upon which the case of *State vs. Sargent* was decided, thereafter wandered farther afield in his unclassified quotations from other cases, based on other statutes widely unlike section 1894, Alaska.

1. The statutory definitions of rape are as numerous as the State codes, no two are alike; Alaska statute, under consideration in this case, is unique and unlike all others.

2. The case at bar rests for final decision upon this court's construction of the intent and purpose of section 1894, Alaska, upon which the indictment in this case was returned, and not upon common law definitions, or the statutes or decisions of other States.

3. It is a fundamental principle in criminal law that a defendant cannot be legally convicted of any crime which is not included within the averments of the charging part of the indictment; if, as to any crime not specifically charged, the necessary descriptive or charging averments are not included in the indictment, as to that crime the indictment does not state facts sufficient to constitute the

crime; and especially is that true if it is apparent on the fact of the indictment, as in the case at bar, that averments are purposely omitted, so as to limit the charge to a specific crime—in such case one cannot be convicted of a crime whose necessary elements are thus purposely omitted from the indictment.

THE OREGON RULE

Counsel for defendant in error has made the case of *State vs. Sargent*, 32 Or. 110, 49 Pac 889, his *piece de resistance*, so to speak, in his brief, and seems to think it settles about all the questions in the case at bar. We quoted that case in our original brief, at page 9, on the only question really decided by that court, but did not then (and do not now) think it touched the other important question in this case.

Because of the stress laid on that case by the defendant in error counsel for plaintiff in error in this case made a personal examination of the entire record in the Sargent case, and found, as stated by Judge Wolverton in his statement and opinion, that the defendant Sargent had been *indicted* for and *convicted* of an *assault with intent to rape* a female child under the age of consent. The indictment was found under and based on section 1740, Hill's Ann. Laws Or., which provided a penalty against any person guilty of an

assault with intent to commit rape, and it was not found or based on the section 1733 of that statute providing penalty for statutory rape.

The following is a copy of the charging averments in the Sargent indictment:

"Chet Sargent, accused by the grand jury of the County of Morrow, by this indictment, of the crime of assault with intent to commit a rape, committed as follows:

"The said Chet Sargent on the 14th day of April, A. D. 1896, in the County of Morrow and State of Oregon, he, the said Chet Sargent, being then and there over the age of sixteen years, unlawfully and feloniously, in and upon one Bessie Robbins, a female child, under the age of sixteen years, to-wit, of the age of about eight years, an assault did make and her, the said Bessie Robbins, then and there did ill treat and lay hold of and forcibly throw upon the hay, and did lay his body upon and against her, the said Bessie Robbins, with the intent then and there, her the said Bessie Robbins, forcibly and against her will, felonously to carnally know and ravish and carnally abuse, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon."

Under the Oregon statute quoted by Judge Wolverton and the charging averments of the in-

dictment in that case, it is clear there could be no question in the Sargent case such as is presented in the case at bar. Every element of the crime of assault with intent to commit rape is charged in the Sargent indictment—but they are not charged in the indictment in the case at bar.

The indictment in this case does *not* charge "assault with intent to commit a rape," nor that it was "forcibly and against her will," as in the Sargent case, nor make any other averments of force from which the jury or the court could infer an assault with intent. On the contrary, it was carefully drawn by the United States Attorney, upon the facts known to him, to charge only the crime denounced in the second clause of section 1894, Alaska, *which crime could only be perpetrated "with her consent."*

Upon demurrer the indictment on the Sargent case would be held to be direct and certain as against every requirement of section 2150, Alaska, (page 19 on original brief)) because it was direct and certain as regards, 1 the party charged, 2 the crime charged, and 3 the particular circumstances of the crime charged when they are necessary to constitute a complete crime.

But the Sakinoff indictment, in the case at bar, considered as an indictment for "assault with intent

to commit rape," would be open to a demurrer that it does not state facts sufficient to constitute that crime. An indictment which does not state facts sufficient to constitute a crime—no court ought to sustain such an indictment, or imprison a citizen upon a verdict based thereon.

THE CALIFORNIA RULE

In the case of *People vs. Babcock* (Cal) 117, Pac. 549, cited by defendant in error at page 18 of his brief, the court holds plainly that a charge of statutory rape includes the offense of assault with intent to commit rape without force.

That ruling is not inconsistent with the definition of rape as stated in the California statute quoted by the court in that opinion:

"[1] The particular kind of rape charged by the information was that defined by subdivision 1 of section 261, Penal Code, as follows: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator * * * (1) where the female is under the age of sixteen years."

Note that the element of force is not purposely excluded in this definition as it is in the second clause of the Alaska section 1894. Nor are we advised what averments are charged in the indictment in the Babcock case. It may be that an examination of that indictment would show that it

charged facts sufficient to support the element of force, though that court said, following the quotation above:

"It is not disputed, of course, that in such a case neither force nor violence is essential to the commission of the crime of rape, or that it is immaterial that the act of sexual intercourse was with the full consent of the female."

Whatever the averments in the Babcock indictment may have been it is interesting to note that long after the decision in that case the courts of that State, in the case of *People vs. Akin*, 143 Pac. 795, cited and quoted on page 21 of plaintiff in error brief in this case, said:

"It is thus to be seen that the element of force is not charged, as indeed it is not required to constitute the offense of rape on the person of a female under the age of consent. The crime of assault with intent to commit rape necessarily implies, however, the use of force and violence, and negatives the idea of consent upon the part of the victim. Of course, if the defendant had been charged with rape on the person of an adult, the element of force would have been included in the charge, and thus the information would have comprehended the crime of which he was convicted. Or, if the defendant had been convicted of an 'attempt to com-

mit rape,' we could say that it was covered by the charge, because every crime includes an attempt to commit said crime. But 'an assault implies repulsion, or at least want of consent on the part of the person assaulted.' * * * *The same criticism might be made of the instruction given here, but in addition we think the verdict does not respond to the averments of the information. This is not a technical objection, but it goes to the fundamental right of the defendant to be formally charged with the crime of which he may be convicted.*"

Does the Atkin case state the correct rule in California?

THE OKLAHOMA RULE

The case of *Pittman vs. State*, 126 Pac. 696, from Oklahoma, cited in the brief of counsel for defendant in error, was begun under a statute which provided:

"2414. Rape defined. Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: First, where the female is under the age of sixteen years," etc.

Rev. Laws of Oklahoma, 1910, Vol. 1.

This case, however, cannot be authority against us, because upon its face it shows that the indictment specially charged that

"One Joe Pittman, late of Bryan County, did unlawfully and feloniously in and upon one—a female under the age of fourteen years, make an assault, and," etc.

It may be admitted that where the indictment contains the necessary averments of facts charging an assault there may be a conviction for an assault. But that is not the fact in the case at bar, and the Oklahoma decision strengthens, rather than weakens, our argument.

THE GEORGIA RULE

The case of *Suggs vs. State* (Ga.) 100 Southeastern, 778, cited by counsel for defendant in error, is scant in its disclosures. Only the syllabi of the case are in the reporter, and nothing is shown of the averments in the indictment. The case was based upon an Act of the Georgia assembly, found at page 259, of the Acts of the General assembly, 1918. A careful examination of the act discloses that no provision is contained in it, similar to the second clause of section 1894, Alaska. It merely declares "sexual or carnal intercourse with any female child under the age of fourteen years" to be rape, without saying anything about force or consent, or otherwise defining the crime. In all probability the indictment in that case contained

the usual averments of every necessary element of the crime of rape, including those of assault.

THE INDIANA RULE

Counsel also cites the leading case from Indiana, *Gordon vs. State*, 98 Northeastern, 627, and the other Indiana cases cited therein. But an examination of the Indiana statute in connection with the strong language used in the decision leaves no doubt that no such question was ever presented there as in the case at bar.

The Indiana statute reads:

"Section 2250. Whoever unlawfully has carnal knowledge of a woman, forcibly and against her will, or of a female child under sixteen years of age, is guilty of rape."

Burns Ann. Ind. Stat., 1914, Vol. 1.

The Indiana court in the Gordan case said:

"It is impossible to conceive of a rape without an assault and battery for that purpose. The crime of rape necessarily includes an assault and battery with intent to commit rape." Judging from the statute and that language it is also impossible to conceive of the Indiana court sustaining an indictment or a conviction based on an indictment for rape, or assault with intent to commit rape, which does not charge the necessary elements of the crime.

Then, too, the affidavit quoted in this case does so charge the elements of an assault and the case is not in point against us.

THE NEVADA RULE

Counsel for defendant in error in declaring that section 1894, Alaska, defining rape in that Territory and under which the indictment in this case was drawn, was borrowed bodily by Congress from the Oregon Code, raised an interesting question. That statement was evidently made with the idea of binding us to the ruling in the Sargent case, and limiting the United States Circuit Court of Appeals thereby, in its construction of that section. But a comparison of the section 1894, Alaska, found at page 18 in our original brief, and the section 1733, Oregon, quoted by Judge Wolverton in the Sargent case, found on page 10 of the brief of defendant in error, show that the two sections are entirely dissimilar, and not even identical in meaning or idea.

Counsel for plaintiff in error are not able, with certainty, to advise this court from what State section 1894, Alaska, was borrowed, but judging from well-known facts and phraseology suggests that the Alaska section was borrowed from the Nevada code, since it is more nearly like the phrase-

ology and ideas of that than any other statute counsel can find, with their limited library facilities.

In 1899-1900, when the Alaska codes were being drafted by Congress, Senator Carter, of Montana, was the chairman of the Senate Committee on Territories, and had charge of the preparation of those codes. They were prepared by cutting and pasting from the codes of the western states and it may be the section 1894 was thus borrowed from Nevada, with whose laws Senator Carter was familiar. It was evidently not copied from the Montana definition of rape, for that more nearly resembles the statute of California. The statutory definitions of rape in Nevada and Wyoming are nearly identical with that in Alaska, and counsel thus suggests the Nevada genesis of section 1894, Alaska.

The Nevada section, Rev. Laws Nevada, 1912, section 6442, now reads as follows:

"Section 177. Rape is the carnal knowledge of a female forcibly and against her will. * * * and any person of the age of sixteen years or upwards who shall have carnal knowledge of any female child under the age of sixteen years, either with or without her consent, shall be adjudged guilty of the crime of rape, and be punished as before provided."

So far as we can ascertain that was the Nevada statute when the Pickett case arose: *State vs. Pickett*, 11 Nev. 255; 21 Am. Rep. 754; Book 35 Pacific States Reports.

In that case, as in this, the trial court instructed the jury upon the elements of the crime of rape, and then added:

"But if the jury believe that the defendant attempted to commit a rape and failed to affect a penetration, as above described, they should find a verdict of guilty of an assault with the intent to commit rape."

The supreme court of Nevada held that instruction to be error, and reversed the case therefor, and said:

"The common law definition of rape is "the carnal knowledge of a woman forcibly and against her will," (4 Blacks, Com. 210). The same definition is adopted by our statute (Comp. Laws, Sec. 2350). Under this definition an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called "rape." It is obvious that here are two crimes differing essentially in their nature,

though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. As an assault implies force and resistance, *the crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female.*"

THE ALASKA STATUTE

Counsel has again quoted from Judge Beatty's opinion in the Pickett case because of the almost exact similarity of the two statutory definitions under consideration, and because it more clearly discloses just what the elements of the crime are which is denounced in the second clause of section 1894, Alaska.

That section defines two crimes, and two only, and its provisions, if carefully analyzed and understood, are logical and easily applied to the long established principles of law relating to the crime of rape.

Section 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, *or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

Now, the first clause of that section, as pointed out by Judge Beatty in the Pickett case, is the old common law definition of rape.

"Under this definition," he says, "an assault is a necessary ingredient of every rape, or attempted rape." The second clause of the Alaska section, however, is unique—*sui generis*—and differs from all other definitions of statutory rape, which counsel has been able to find, for it cannot be violated without the act is committed "*with her consent.*" In other words, the substantive crime described in the second clause is not a crime without it appears, and is so averred in the indictment, that the carnal knowledge was had "*with her consent.*" Without that fact appears affirmatively there is no crime, under the second clause. In the Nevada statute it is a crime to have "carnal knowledge of any female child under the age of sixteen years, *either with or without her consent,*" but in the Alaska statute there is no crime committed, under the second clause, unless the act was committed "*with her consent.*"

In the crime defined in the second clause there are four distinct elements described, each of which, under the ordinary rules, must be affirmatively charged and averred in the indictment and proved on the trial, to secure a legal conviction:

1. The defendant must be sixteen years old, or older,

2. He must carnally know and abuse a female person,

3. Under sixteen years of age,

4. WITH HER CONSENT.

If either of these necessary elements is lacking in the charging part of the indictment, it will not state facts sufficient to charge the crime; if the prosecution fails to prove either, the court should direct a verdict for the defendant.

In a much stronger measure the words of Judge Beatty, declaring the different characters of the two crimes stated in the Nevada statute, are applicable to the two different crimes stated in the Alaska section. His statement with respect to the substantive crime stated in the first clause of the Navada statute applies exactly to the first substantive crime stated in the Alaska section. But all that he says with respect to the character of the crime defined in the second clause of the Nevada statute, while true of the second clause and crime stated in the Alaska statute, does not go far enough, for the crime so defined and so clearly stated in the second clause of the Alaska statute cannot be committed "without the consent" of the female, as it

can under the Nevada clause, *but only "with the consent."*

Even more clearly, then, than the Nevada statute, the Alaska statute excludes every possible element of force and violence from the character of the crime created in the second clause of the Alaska law,—intentionally and purposely, by every rule of grammar and legal construction. The intent of Congress in enacting that second clause is clear and without the need of construction. Without the act denounced in the second charge of the Alaska statute is committed "with the consent" of the female, there is no crime.

We frankly submit, then, to this court:

1. That the second clause of section 1894, Alaska, by its clear and positive provisions, excludes from the elements of the crime defined therein every element of force or violence from which an assault with intent may be found or inferred.

2. That the indictment in this case was drawn under that clause and does not charge or aver any fact upon which force or violence, or assault with intent, can be based or inferred;

3. That the testimony in this case does not contain any evidence tending to prove the use of any force or violence, or any assault with intent, or otherwise, directly or by inference;

4. That the instruction on assault given by the trial judge was not given to meet any definition of the statute, or any charge of the indictment or any proofs offered on the trial, but by mistake in reference to the element of attempt.

Now the indictment in this case was not sought to be drawn under the first clause of section 1894, Alaska,—no charge that it was "forcibly and against her will" is averred; it is conceded that it was meant to charge the defendant under the second clause, and the indictment does not affirmatively charge that the act was done "with her consent," which is just as necessary a charge or element in the second clause, as "forcibly and against her will," is in the first. The indictment does not state facts sufficient to constitute the crime defined in the second clause of section 1894, Alaska, and since it is never too late to raise that question:

Comes now the plaintiff in error, the defendant below, by James Wickersham and J. W. Kehoe, his attorneys, and demurs to the indictment in this case, and for ground of demurrer thereto says (1) *that the said indictment shows upon its face that it does not state facts sufficient to constitute any crime, and* (2) *because it shows upon its face that it does not state facts sufficient to constitute the*

crime of assault with intent to commit rape, with which crime defendant was convicted upon said indictment.

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